# Rathnavel s/o Packirisamy & Ors v Koperasi NLFCS Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(W)-281–02 OF 2020
LAU BEE LAN, MOHD SOFIAN AND DARRYL GOON JJCA
12 APRIL 2022

*Damages — Assessment — Breach of trust — Plaintiffs sued trustee for indemnification of losses they had suffered, equitable compensation and restitution of all profits trustee had secretly made at their expense — Trial court found trustee liable on plaintiffs' claim and ordered damages to be assessed — Plaintiffs appealed on ground trial judge should himself have determined the damages payable by trustee at end of trial and not ordered separate proceeding for assessment of damages — Whether merely because plaintiffs had adduced at trial expert evidence of market value of land was insufficient to determine all the damages payable to plaintiffs especially with regard to profits trustee had made — Whether plaintiffs' own claim and trial court's order was for trustee to make restitution for secret profits it had made — Whether quantum of such profits could only be determined via separate proceedings for its assessment*

The appellants were part of 160 individuals who lived in and around the Temiang estate in Seremban who decided to jointly acquire a piece of land and have it subdivided so that each of them would have about 10,890 sqft of land to build their houses and use the remaining portion of the land as common property. Since the vendor of the land preferred to deal with a single entity, the intending buyers approached the respondent to buy the land on their behalf. The respondent, which was formed to uplift the socio-economic and land-holding status of the Indian community, especially those who worked in the estates, agreed to the proposal. Thereafter, the intending buyers contributed monies to the respondent to buy the land and have it transferred into its name for the purpose of developing a residential estate for the participants in the project. After the houses had been built, the appellants discovered that the units that each of them received was only about 1,540 sqft in size and that apart from the 160 houses for the participants, the respondent had also constructed many more buildings, including commercial lots, of varying sizes which it had sold to third parties. The appellants sued the respondent for breach of trust and breach of fiduciary duties and sought indemnification for the losses they had suffered, equitable compensation and restitution of all profits the respondent had made — all of which were to be assessed by the court. After a trial, the High Court decided in favour of the appellants, holding that the respondent had committed a clear breach of trust in respect of the land; that the respondent had entered into profit-sharing arrangements with private contractors and had made profits from the sale of

houses to third parties. The court ordered an assessment of damages to, inter alia, determine the profits that the respondent had made without the appellants' knowledge. The appellants' sole complaint in the instant appeal against the decision was that the trial judge should himself have determined the damages that were payable to the appellants at the conclusion of the trial and not have ordered a separate proceeding for assessment of damages. This, the appellants contended, was because they had adduced in evidence during the trial a valuation of the land conducted by a registered valuer who opined that the land as it stood with the subdivision and completed buildings had a value of RM43,776,336, which worked out to about RM37.68 per sqft.

**Held,** unanimously dismissing the appeal:

(1) The valuation made by the appellants' valuer did not include the actual profits made by the respondent qua trustee. Given that the trial court's order was for restitution of the profits made by the respondent, there was no evidence led as to how much the respondent had actually profited from the sale of the housing units and the sale of the balance of the land to third parties based on the profit-sharing scheme it had with contractors and what other profits the respondent might have received in its capacity as trustee (see paras 38–40).

(2) Evidence had to be led as to the actual profits made or what the profits might have been, based on a multitude of factors, eg the number of housing units sold, the prices they were sold for, the size of the balance of the land sold, when the sale took place, etc. It was wrong for the appellants to premise the profits the respondent might have made solely on their valuer's valuation of the land (see paras 40–41).

(3) Clearly, this was not an uncomplicated case of a breach of trust where it was possible to assess the damages suffered upon appropriate evidence being led. The total compensation that the appellants were entitled to had to be assessed and such was also contemplated in the prayers sought by the appellants in their statement of claim. Given the circumstances of the case, the reliefs sought, the findings made by the trial court and the orders that were made, it was in the trial judge's discretion to order an assessment of the damages payable to the appellants and it could not be said that the judge had erred in making such an order (see paras 42–44).

**[Bahasa Malaysia summary**

Perayu merupakan sebahagian daripada 160 individu yang tinggal dalam dan sekitar estet Temiang di Seremban yang membuat keputusan untuk secara bersama memperoleh satu bidang tanah dan membahagikannya agar setiap daripada mereka akan memperoleh 10,890 kaki persegi tanah tersebut untuk membina rumah mereka dan menggunakan baki bahagian tanah tersebut sebagai harta guna sama. Atas sebab penjual tanah tersebut ingin berurusan

dengan satu entiti, pembeli telah mendatangani responden untuk membeli tanah tersebut bagi pihak mereka. Responden, yang telah ditubuhkan untuk meningkatkan status sosio-ekonomi dan pegangan tanah komuniti India, terutamanya mereka yang bekerja di estet, bersetuju dengan cadangan tersebut. Selepas dari itu, para pembeli telah menyumbangkan wang kepada responden untuk membeli tanah tersebut dan memindahkannya kepada namanya untuk tujuan membangunkan estet kediaman untuk mereka yang terlibat dengan projek tersebut. Selepas rumah tersebut telah dibina, perayu mendapati bahawa unit yang diterima oleh mereka hanya lebih kurang 1,540 kaki persegi dan selain daripada 160 rumah untuk para peserta, responden turut membina beberapa lagi bangunan, termasuklah lot komersil, berbeza saiz yang telah dijual kepada pihak ketiga. Perayu telah menyaman responden untuk pecah amanah dan pelanggaran tanggungjawab fidusiari dan ganti rugi daripada sebarang kerugian yang dialami mereka, pampasan yang berekuiti, dan pemulangan semua keuntungan yang dibuat oleh responden — yang mana kesemuanya akan ditaksir oleh mahkamah. Selepas perbicaraan, Mahkamah Tinggi membuat keputusan yang memihak kepada perayu, dan memutuskan bahawa responden telah melakukan pecah amanah berkaitan dengan tanah tersebut; bahawa responden telah memasuki perjanjian perkongsian keuntungan dengan kontraktor swasta dan membuat keuntungan daripada penjualan rumah ke pihak ketiga. Mahkamah memerintahkan taksiran kerugian kepada, antara yang lain, menentukan keuntungan yang responden telah perolehi tanpa pengetahuan perayu. Satu-satunya aduan perayu dalam rayuan ini terhadap keputusan adalah hakim bicara sepatutnya memutuskan sendiri ganti rugi yang perlu dibayar kepada perayu di akhir perbicaraan dan bukannya memerintahkan prosiding yang berasingan untuk menaksir ganti rugi. Ini, dihujakan oleh perayu, adalah kerana mereka cuba untuk mengemukakan keterangan sewaktu perbicaraan penilaian tanah dilakukan oleh penaksir berdaftar yang berpendapat bahawa tanah sepertimana keadaannnya sewakti pembahagian dan selesai pembinaan bangunan mempunyai nilai RM43,776,336 yang terjumlah keapda RM37.68 setiap kaki persegi.

**Diputuskan**, sebulat suara menolak rayuan:

(1) Taksiran yang dibuat oleh penaksir perayu tidak mengambil kira keuntungan sebear yang dibuat oleh responden sebagai pemegang amanah. Mengambil kira perintah mahkamah bicara adalah untuk pemulangan keuntungan yang dibuat oleh responden, tiada keterangan yang diketengahkan berkaitan dengan berapa banyak responden sebenarnya mendapat keuntungan daripada penjualan unit perumahan dan penjualan baki tanah kepada pihak ketiga berdasarkan skim perkongsian keuntungan diantaranya dan kontraktor dan apa keuntungan lain yang responden mungkin terima atas kapasitinya sebagai pemegang amanah (lihat perenggan 38–40).

(2) Keterangan telah dikemukakan berkaitan dengan keuntungan sebenar yang dibuat atau keuntungan yang sepatutnyam berdasarkan beberapa faktor, sebagai contoh, bilangan unit perumahan yang dijual, harga ianya dijual pada, luas baki tanah yang dijual, bila penjualan tersebut berlaku, dan sebagainya. Ianya adalah salah untuk perayu untuk menyatakan keuntungan responden dibuat berdasarkan hanya taksiran penaksirnya terhadap nilai tanah tersebut (lihat perenggan 40–41).

(3) Adalah jelas bahawa ini bukanlah satu kes pecah amanah yang tidak rumit yang mana kerugian boleh ditaksir berdasarkan keterangan yang dikemukakan. Jumlah ganti rugi perayu mempunyai hak kepada perlu ditaksir dan juga difikirkan dalam rayuan yang dipohon oleh perayu dalam penyataan tuntutan mereka. Mengambil kira keadaan kes, relif yang dipohon, dapatan yang dibuat oleh mahkamah bicara dan perintah yang dibuat, ianya dalam budi bicara hakim bicara untuk memerintahkan taksiran ganti rugi yang perlu dibayar kepada perayu dan ianya tidak boleh dikatakan bahawa hakim bicara terkhilaf dalam membuat perintah sedemikian (lihat perenggan 42–44).]

**Cases referred to**

*Labuan Ferry Corp Sdn Bhd v Chin Mui Kien (trading under the name and style of Econ Focus Enterprise) & Ors and other appeals* [2018] 3 MLJ 256, CA (refd)

**Legislation referred to**

Co-operative Societies Act 1993

**Appeal from:** Civil Suit No WA-22NCVC-561–09 of 2016 (High Court, Kuala Lumpur)

*M Rajenthirakumar a/l Malaiapan (Hiu Yeat Fong with him) (Kumar Assoc) for the appellants.*

*DP Vijandran (Khairun Niza bt Husnin with him) (Aru & Co) for the respondent.*

**Darryl Goon JCA:**

**[1]** This was an appeal against the decision of the learned High Court judge in ordering an assessment of damages after a full trial and after having made a finding on liability.

**[2]** The appellants in this case were the plaintiffs, who had successfully obtained a decision on liability in their favour against the respondent, the only defendant in the High Court.

**[3]** This appeal raises only one main issue and that is, whether the learned trial judge ought to have determined the quantum of damages the respondent was liable for, at the end of the trial and upon the evidence adduced at the trial, instead of ordering a separate assessment thereafter.

BACKGROUND

**[4]** In order to assess the learned judge's decision in making the order for the assessment of damages subsequent to the trial, the background, the appellants' case and, particularly, the findings of the learned judge need to be examined.

**[5]** The appellants consisted of some 160 individuals. Their claim was in respect of a piece of land measuring 17.59 hectares, previously held under Grant No 17937 Lot No 3032 and, prior to that, under Grant No 4010 Lot No 715. This said land will hereinafter be referred to as the 'land'. The land has since been subdivided into separate pieces and held under various new titles issued.

**[6]** Before its acquisition, an idea was mooted that the land be acquired jointly by several individuals. These individuals included workers and residents, including the family members of residents, in and around the Temiang Estate in Seremban. It was then agreed that the land, when acquired, would be divided into 160 lots of approximately a quarter of an acre (approximately 10,890 sqft) each and the remaining portion of the land be used as common property.

**[7]** The vendor of the land, Sumle Enterprise, however, preferred to deal with one single entity and as such the respondent was approached to purchase the property on behalf of the intending purchasers.

**[8]** The respondent was and is a co-operative society registered under the Co-operative Societies Act 1993 and has, among its objectives, to uplift the socio-economic and land holding status of the Indian Community in Malaysia and to provide an opportunity for land and house ownership among Indian estate workers in the country.

**[9]** The respondent agreed and it thus came to be that the land was acquired by the respondent in what became known as the 'Temiang Land Scheme'.

**[10]** The participants of this Temiang Land Scheme each paid a sum of RM550 to the respondent towards the acquisition of the land with a view to each participant acquiring approximately a quarter acre of it (approximately 10,890 sqft).

**[11]** The appellants consisted of both the original participants themselves and individuals claiming through or on behalf of the estate of the original participants in the Temiang Land Scheme.

**[12]** The respondent's purchase of the land was completed and the land transferred to the respondent in or around 1973.

**[13]** Additional sums of monies were subsequently paid by the original participants of the Temiang Land Scheme to the respondent, towards expenses incurred in respect of the land.

**[14]** Sometime in 1980 there was a meeting among the parties and there was said to be an agreement for the land to be developed and then, thereafter, subdivided and transferred to the participants.

**[15]** Sometime in 1981, it was agreed, inter alia, that the land be developed as a housing project and the respondent to implement this development.

**[16]** Several agreements were subsequently entered into between the parties and further payments made to the respondent.

**[17]** In the meantime, several companies appointed by the respondent to undertake the development of the land failed. Ultimately, however, the development and the housing units for the appellants were completed in 2004.

**[18]** Apart from the housing units for the appellants, what was constructed on the land were many more units of houses of varying sizes. The appellants however, were only allotted units of houses in the region of 1,540 sqft each, far smaller than what was originally intended ie land of a quarter of an acre (or approximately 10,890 sqft) each.

**[19]** The appellants also contended that the respondent had sold and transferred many other units of houses built on the land and had profited from this.

**[20]** The appellants' primary cause of action against the respondent was thus premised upon a breach of trust and breach of fiduciary duties by the respondent qua trustee of the land for the appellants.

**[21]** It is significant to note that the reliefs sought by the appellants in their amended statement of claim were as follows:

28.~~25~~ Wherefore the Plaintiffs claim against the Defendant the following relief:

(a) That the Plaintiffs be indemnified by the Defendant for the *losses suffered by them in consequence of the breach of trust committed by it as found liable and as assessed by this Honourable Court*;

(b) Alternatively, the Defendant is ordered to pay to the Plaintiffs *equitable compensation as assessed by this Honourable Court*;

(c) Restitution of all profits made by the Defendant;

(d) Interests on the footing of wilful default upon such indemnity or compensation and restitution at two (2) per centum (%) on monthly rests from the date of this Writ and Statement of Claim until full settlement;

(e) Costs of this suit on an indemnity basis; and

(f) Such further and other relief as this Honourable Court shall deem just and equitable. (Emphasis added.)

## THE DECISION OF THE HIGH COURT

**[22]** After a full trial, the learned judge found for the appellants. The learned judge held that there was clearly an express trust created in respect of the land and the respondent held the land in trust for the appellants. The respondent was thus a trustee of the land and what became of the land after it was developed with units of houses and subdivided.

**[23]** It was also held by the learned judge that the appellants, in receiving their respective units of houses, had not relinquished their right to the balance of the quarter acre that they were supposed to acquire in the land.

**[24]** The learned judge also found that the respondent had entered into a profit-sharing arrangement with the contractors appointed to develop the land and the respondent had profited from this arrangement through the sale of units of houses erected on the land and parts of the land to third parties. The following is stated in the learned judge's grounds of judgment:

> This led to not only the construction of 160 houses to the participants of the scheme but also many other houses evidenced by the schedules to the supplementary agreement with DP and also the letter from the Negeri Sembilan PTG dated 1 November 2016. The participants were never privy to this arrangement of profit sharing between the defendant and DP.
>
> Apart from building and selling of houses to non-participants of the scheme, the defendant also carted away part of the participants remaining balance of the land (after having minus the land utilised to build the 160 houses for the participants) by selling them to third parties. This too, without the knowledge of the participants.
>
> Having regard to the fact that the defendant never paid a single cent for the land and was entrusted with the title of the land in a position as trustee, the profit sharing

agreement with DP, the selling of houses to non-participants of the land scheme and the selling of the land plots to third parties clearly tantamount to a breach of trust by the defendant.

**[25]** In the ultimate, as for damages, the learned trial judge stated as follows:

[12] On the issue of damages, I am of the view that proper quantification of damages can only be done vis a vis an assessment proceedings.

**[26]** The operative part of the judgment dated 20 January 2020 that was entered after the trial read as follows:

*MAKA ADALAH PADA HARI INI DIHAKIMI DAN DIPERINTAHKAN* seperti berikut:

(1) tuntutan Plaintif-Plaintif dibenarkan;

(2) bahawa Plaintif-Plaintif berhak secara restitutsi, kesemua keuntungan yang teleh diperolehi oleh Defendan dalam skim pembangunan Tanah Temaian (iaitu pembangunan atas tanah yang dahulunya dipegang dibawah Geran No 17937 No Lot 3032, Mukim Seremban, Negeri Sembilan dan yang juga kini dikenali sebagai 'Taman Bukit Zamrud');

(3) Defendan hendaklah memberikan suatu akaun sebenar akan kesemua wang yang telah diterima olehnya di bawah skim pembangunan Tanah Temiang tersebut;

(4) kaveat-kaveat pendaftar dimasukkann terhadap geran-geran bagi lot-lot yang belum dijual dalam skim Pembangunan Tanah Temian tersebut;

(5) jumlah pampasan kepada plaintif-plaintif untuk ditaksir oleh Mahkamah yang Mulia ini;

(6) Defendan membayar kepada Plaintif -Plaintif, jumlah sebanyak RM81,311.50 sebagai kos tindakan tertakluk kepada fi alokator.

**[27]** There was an appeal filed by the respondent against the decision of the learned judge on the finding of liability. This was the appeal in Civil Appeal No W-02(NCVC)(W)-280–02 of 2020 ('Appeal 280'). Appeal 280 was heard together with the instant appeal.

**[28]** Appeal 280 was allowed in part by this court. The orders for an account and that registrar's caveats be entered in respect of the lots that have not been sold, were set aside. This was because they were not orders sought in the action and this was conceded by counsel for the appellants. Hence paras (3) and (4) of the judgment of the court dated 20 January 2020 were set aside.

A THE ISSUE OF DAMAGES/COMPENSATION

**[29]** It was the appellants' contention in this appeal that the trial was not conducted in a matter that was bifurcated such that the assessment of damages or compensation would take place in a separate proceeding after the trial and
B determination of liability.

**[30]** As such, it was contended that the appellants had sought, obtained and adduced into evidence at the trial, a valuation of the land to ascertain the
C compensation payable to each appellant. This was the valuation conducted by one Mr Palaniappan @ Mohan, a registered valuer. Mr Palaniappan, testifying on behalf of the appellants, had opined that the value of the land as subdivided and with the buildings on it was RM43,776,336 and this worked out to about RM37.68 per sqft.

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**[31]** In his witness statement, Mr Palaniappan's answer to question 6 was as follows:

> Q6. Could you please describe the nature as well as the location of the said lands?
>
> E A6: As stated at page 2 to page 4 IDB Part B Vol (the Valuation Report), the said land is located within Taman Bukit Zamrud in the locality of Jalan Temiang, Seremban which falls under the jurisdiction of Majlis Perbandaran Seremban. *The site comprises 420 sub-divided plots with individual titles issued (45 parcels of acquired terraced and bungalow plots; 44 parcels of completed single storey medium low cost terraced houses, 167 parcels of completed single storey terraced houses, 147 abandoned/vacant parcel of residential plots, 9 abandoned/vacant parcels of commercial plots, 7 vacant parcels of bungalow plots and 1 parcel of residential (apartment development plot) having a combined title land area of about 21.187 acres (922,905 square feet).* (Emphasis added.)

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**[32]** Evidence was also led in the trial as to the number of lots that made up what was the land and the names of their registered owners.

**[33]** It was thus contended by the appellants that the court should have
H proceeded to award damages to each of the appellants based on the valuation of the land as it currently stands.

FINDING OF THIS COURT

I **[34]** The relief sought by the appellants in this case included an indemnity for the losses suffered by the appellant consequent upon the respondent's breach of trust 'as assessed by this honourable court'. It also included an alternative claim for equitable compensation 'as assessed by this honourable

court'. An assessment of the losses and compensation that the appellants should be entitled to was thus referred to in the reliefs prayed for in the amended statement of claim.

**[35]** In *Labuan Ferry Corp Sdn Bhd v Chin Mui Kien (trading under the name and style of Econ Focus Enterprise) & Ors and other appeals* [2018] 3 MLJ 256, Rahman Sebli JCA (as His Lordship then was) stated somewhat pointedly:

> [77] With due respect to the learned judge, since the appellant's prayer was for damages to be assessed, the proper course for him to take would have been to proceed with assessment of damages in order that the appellant could adduce evidence to prove the quantum of damages that she claims to have suffered.

The complaint in that case was of course quite the opposite to the appellants' in the instant case. However, the principle ought to be the same. An assessment was sought and, to which it may be added, no order or direction was given to the contrary by the court.

**[36]** Also prayed for by the appellants was a 'restitution of all profits made by the defendant'.

**[37]** The orders that were made by the learned judge after the trial that remained and were not set aside in Appeal 280, were:

> (2) bahawa Plaintif-Plaintif berhak secara restitutsi, kesemua keuntungan yang teleh diperolehi oleh Defendan dalam skim pembangunan Tanah Temaian (iaitu pembangunan atas tanah yang dahulunya dipegang dibawah Geran No 17937 No Lot 3032, Mukim Seremban, Negeri Sembilan dan yang juga kini dikenali sebagai 'Taman Bukit Zamrud');' and
>
> (5) jumlah pampasan kepada plaintif-plaintif untuk ditaksir oleh Mahkamah yang Mulia ini;

**[38]** The valuation of the appellants' expert valuer Mr Palaniappan does not include the actual profits made by the respondent qua trustee. In fact, there was no evidence led as to how much the respondent had actually profited from the sale of units of houses and the sale of the with the contractor and what other profits the respondent might have received in its capacity as trustee.

**[39]** In fact, the actual profit that the respondent might have received could be far less than the amount the court would arrive at, if computed and based merely on Mr Palaniappan's opinion of RM37.68 per sqft.

**[40]** It needs to be emphasised that the order of the learned judge was for 'restitution' of the 'profit' ('keuntungan') made by the respondent. The amount of profit made by the respondent cannot be determined and quantified based merely on an opinion as to the value of the land per square foot. Evidence has

to be led as to the actual profits made or what it might probably be, based on a multitude of factors such as the number of units of houses sold, the price they were sold for, the size of the balance of the land that was sold, when the sale took place, to name a few.

**[41]** It would be manifestly wrong for the appellants to premise the profit that the respondent might have made solely on Mr Palaniappan's valuation of the land. The amount of profit made by the respondent is a fact that has to be established. Besides, there was evidence led that the respondent had entered into a profit-sharing scheme with the contractor. This would suggest that any profit made from sales would be shared between the contractor and the respondent and the entire amount of profit made would not have accrued to the respondent.

**[42]** Clearly, this was not an uncomplicated case of a tort committed where it is possible to assess the damages suffered by a plaintiff upon appropriate evidence being led. This was a claim in equity for breach of trust. Although breach of trust was established, the extent that the respondent had profited financially as a trustee was not established and no doubt this had prompted the learned judge to order an account of profits. However, an account was not a remedy sought by the appellants in the High Court and the order was set aside in Appeal 280. As stated, there was, however, a prayer for 'restitution of all profits' made by the respondent.

**[43]** Hence, it therefore followed that the total compensation that the appellants are entitled to had to be assessed. Such was also contemplated in the prayers sought in the amended statement of claim. Given the circumstances, it would have been in the learned judge's discretion to order an assessment of the compensation due to the appellants in order to give effect to his findings and the orders made.

**[44]** It cannot be maintained that the learned trial judge was wrong or had erred in ordering an assessment of damages, given the circumstances of the case, the reliefs sought, the findings and the orders made.

**[45]** The appeal was accordingly dismissed with costs.

*Appeal dismissed.*

Reported by Ashok Kumar